

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ITV DIRECT, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
HEALTHY SOLUTIONS, L.L.C., et al.,)	
)	
Defendants.)	
)	
CAPPSEALS, INC.,)	Civil Action No. 04-CV-10421-JLT
)	
Plaintiff-in-Intervention,)	
)	
v.)	
)	
HEALTHY SOLUTIONS, L.L.C., d/b/a)	
DIRECT BUSINESS CONCEPTS; ITV)	
DIRECT, INC.; and DIRECT)	
FULFILLMENT, LLC,)	
)	
Intervenor-Defendants.)	
)	

**CAPPSEALS, INC.'S MOTION FOR SANCTIONS
AGAINST ITV DIRECT, INC.**

Plaintiff-in-Intervention Cappseals, Inc.'s (hereinafter "Cappseals") moves for an Order from this Court sanctioning plaintiff ITV Direct, Inc. (hereinafter "ITV Direct") pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure and Local Rule 37.1, for its willful failure to comply with this Court's February 1, 2005 Order (the "Order" – docket No. 69). The Order specifically required ITV to supplement its disclosures by February 15, 2005 in response to a motion to compel previously filed by Cappseals. The February 15th deadline came and went without even a phone call explanation. ITV has not supplemented its disclosures with a single document, leaving Cappseals a mere 507 pages of documents produced in 2004. However, Cappseals has reason to believe there may be upwards of 50,000 relevant pages of documents in

ITV's possession, a fact neither confirmed nor denied by ITV.¹ Accordingly, Cappseals' motion for sanctions should be allowed because ITV refuses to comply in good faith with this Court's Order to supplement its disclosures resulting in information and documents being concealed that are critical to the claims brought by Cappseals. In further support of its motion, Cappseals submits the accompanying memorandum of law and the Affidavit of Scott A. Silverman.

WHEREFORE, Cappseals respectfully requests that this Court sanction ITV pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure in the following manner:

1. Strike the affirmative claims ITV Direct, Inc. has asserted against Healthy Solutions L.L.C. in this case;
2. Strike the defenses ITV Direct, Inc. has asserted or may assert against claims brought by Healthy Solutions L.L.C. and Cappseals, Inc.;
3. Prohibit Healthy Solutions L.L.C. from offering affirmative evidence on the amounts of their claims and defenses; and
4. Award Cappseals, Inc. its costs and attorneys' fees incurred pursuing discovery from Healthy Solutions L.L.C., including those charges incurred preparing and arguing its original motion to compel and the present motion for sanctions.

Cappseals also respectfully requests that this Court issue an Order immediately compelling ITV to:

1. Preserve all relevant electronic media;
2. Copy and produce to Cappseals one copy of all relevant electronic media; and
3. Copy and produce to Cappseals one copy of all relevant documents.

¹ The Order also required ITV to produce witnesses for a 30(b)(6) deposition by February 25, 2005. The deposition has also not occurred as it would have been useless without the supplementation required by February 15th.

Respectfully submitted,
CAPPSEALS, INC.
By its attorneys,

/s/ Scott A. Silverman
Daniel J. Kelly BBO# 553926
dkelly@ghlaw.com
Scott A. Silverman, BBO #638087
ssilverman@ghlaw.com
Gadsby Hannah LLP
225 Franklin Street
Boston, MA 02110
(617) 345-7000

DATED: March 3, 2005

LOCAL RULE 37.1 CERTIFICATION

Counsel for Cappseals hereby certifies that the provisions of Local Rule 37.1 have been complied with. As articulated in more detail within the supporting affidavit of Scott Silverman, after the Court ordered deadline for supplementation passed, counsel for Cappseals wrote to counsel for ITV on February 18, 2005 requesting immediate supplementation and a conference to discuss ITV's outstanding obligations to avoid judicial intervention. Conferences were held on February 18, 2005 and on February 28, 2005 in an attempt to urge ITV's compliance with the Court's February 1st Order. ITV has not complied with the Order, instead failing to even participate in requested communications aimed at keeping this dispute from the Court.

/s/ Scott A. Silverman
Scott Silverman

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing Cappseals, Inc.'s Motion For Sanctions Against ITV Direct, Inc. was served on the foregoing attorneys of record pursuant to Fed. R. Civ. P. 5 as follows:

Via electronic notification:

Peter S. Brooks pbrooks@seyfarth.com

Susan W. Gelwick sgelwick@seyfarth.com

Dustin F. Hecker dhecker@pbl.com

Christopher F. Robertson crobertson@seyfarth.com

Via Facsimile & First Class Mail, postage prepaid:

Becky Christensen
O'CONNOR CHRISTENSEN & MCLAUGHLIN LLP
1920 Main Street, Suite 150
Irvine, CA 92614

/s/ Scott A. Silverman

Daniel J. Kelly BBO# 553926

dkelly@ghlaw.com

Scott A. Silverman, BBO #638087

ssilverman@ghlaw.com

Gadsby Hannah LLP

225 Franklin Street

Boston, MA 02110

(617) 345-7000

DATED: March 3, 2005